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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO AND OAKLAND DIVISION

THOMAS FERNANDEZ, LORA SMITH, and TOSHA THOMAS, individually and on behalf of a class of all other persons similarly situated,

Plaintiffs,

vs.

K-M INDUSTRIES HOLDING CO., INC.; K-M INDUSTRIES HOLDING CO., INC. ESOP PLAN COMMITTEE; WILLIAM E. AND DESIREE B. MOORE REVOCABLE TRUST; TRUSTEES OF THE WILLIAM E. AND DESIREE B. MOORE REVOCABLE TRUST; CIG ESOP PLAN COMMITTEE; NORTH STAR TRUST COMPANY; DESIREE B. MOORE REVOCABLE TRUST; WILLIAM E. MOORE MARITAL TRUST; WILLIAM E. MOORE GENERATION-SKIPPING TRUST; and DESIREE MOORE, BOTH IN HER INDIVIDUAL CAPACITY AND AS TRUSTEE OF THE WILLIAM E. AND DESIREE B. MOORE REVOCABLE TRUST'S SUCCESSOR TRUSTS NAMED ABOVE,

Defendants.

Case No. C-06-07339 CW

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

Date: July 3, 2008
Time: 2 p.m.
Courtroom: 2, 4th Floor
Judge: Hon. Claudia Wilken

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I. INTRODUCTION.

In their Opposition to Plaintiffs' Motion to Class Certification, Defendants[1] do not dispute that this case presents common questions of law and fact for a numerous class, nor do they dispute that the claims are raised by typical plaintiffs. Defendants do not dispute that the case is properly certified under several subsections of Federal Rule of Civil Procedure 23(b). Instead, Defendants oppose Plaintiffs' Motion for Class Certification and Appointment of Class Counsel solely on the grounds of Plaintiffs' adequacy as class representatives under Rule 23(a)(4). Thus, Defendants concede that Plaintiffs' proposed class meets the numerosity, commonality and typicality requirements of Rule 23(a) and that the case is properly certified and adjudicated under Rules 23(b)(1)(A), 23(b)(1)(B) and/or 23(b)(2). Finally, Defendants have not otherwise challenged Counsel's qualifications and thereby concede that Plaintiffs' Counsel are sufficiently qualified for appointment as class counsel under Rule 23(g).

Defendants' challenge to Plaintiffs' adequacy under Rule 23(a)(4) ignores the well-established law of the Ninth Circuit, relies upon inapposite cases, and misstates the facts regarding the named Plaintiffs in this action. Defendants assert that Plaintiffs Thomas Fernandez, Lora Smith, and Tosha Thomas are inadequate class representatives because they have an insufficient understanding of the lawsuit and are not engaged enough in the lawsuit to protect the interests of the class members. Defendants' attacks against the named Plaintiffs are unavailing. Ninth Circuit law is settled that to demonstrate adequacy, Plaintiffs must only show that: (1) the proposed class representatives do not have conflicts of interest with other class members, and (2) plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. *See, e.g.*, *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1185 (9th Cir. 2007); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020

[1] The "K-M Defendants," which includes K-M Industries Holding Co., Inc. ("KMH"), the KMH ESOP Plan Committee, and the CIG ESOP Plan Committee, filed an Opposition to Plaintiffs' Motion for Class Certification. Docket No. 119. All other Defendants filed Notices of Joinder in the KMH Opposition. Docket Nos. 121 (Notice of Joinder by the "Moore Trust Defendants," which includes the Moore Trust and Trustees of the Moore Trust; successor trusts which include the Desiree B. Moore Revocable Trust, the William E. Moore Marital Trust, and the William E. Moore Generation-Skipping Trust; and Desiree Moore, both in her individual capacity and as trustee of the Moore Trust's successor trusts named above), 122 (North Star Trust Company Notice of Joinder).

(9th Cir. 1998); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 611 (N.D. Cal. 2004).

Plaintiffs easily satisfy these requirements because they share a common interest with the class: to remedy Defendants' violations of ERISA. Plaintiffs' interests do not conflict with the interests of the proposed class, and they brought this action with the understanding that as class representatives, they must look out for the interests of the class. As discussed herein, Plaintiffs have all actively participated in this lawsuit, and Plaintiffs and their Counsel have demonstrated their ability to vigorously litigate this case on behalf of the class. Therefore, Plaintiffs satisfy the adequacy requirement of Rule 23(a)(4), and the Court should certify this case as a class action.

II. ARGUMENT.

Named Plaintiffs Thomas Fernandez, Lora Smith and Tosha Thomas are adequate representatives of the proposed class because they understand their duties as class representatives and understand the basics of the complex ERISA claims they bring against Defendants. Their knowledge of and commitment to the litigation are sufficient to render them adequate representatives under the governing law.

Defendants assert that Plaintiffs are inadequate class representatives because they have an insufficiently deep understanding of the lawsuit and are not sufficiently engaged in the lawsuit to protect the interests of the class members. In addition, Defendants suggest that two Plaintiffs, Lora Smith and Tosha Thomas, have improper motives for being involved in this suit, rendering them inadequate representatives. These allegations rely on exaggerations and mischaracterizations of Plaintiffs' testimony and should be rejected. Ninth Circuit law demonstrates that Plaintiffs are all adequate class representatives because they have no conflicts of interest with the class, they understand the basic facts and claims of the case, and they have fully participated in the lawsuit.

In order to satisfy the adequacy requirements of Rule 23(a)(4), Plaintiffs need only demonstrate that (1) the proposed class representatives do not have conflicts of interest with the class, and (2) plaintiffs and their counsel will vigorously prosecute the case on behalf of the class. *Dukes*, 509 F.3d at 1185; *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *Hanlon*, 150 F.3d at 1020; *Parrish v. Nat'l Football League Players Ass'n*, 2008 WL 1925208 at *6 (N.D.

Cal. Apr. 29, 2008); *Moeller*, 220 F.R.D. at 611; *Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144, 153 (N.D. Cal. 1991); *In re United Energy Corp. Solar Modules Tax Shelter Invs. Sec. Litig.*, 122 F.R.D. 251, 257 (C.D. Cal. 1988).

Defendants do not seriously challenge the ability of Plaintiffs' counsel to vigorously prosecute the case on behalf of the class. In their Opposition, Defendants make one reference to counsel's adequacy, but only by asserting that offering these Plaintiffs as class representatives calls into question the adequacy of counsel. Thus, the only issue Defendants really raise is the adequacy of plaintiffs.

A. Plaintiffs Sufficiently Understand the Case to Serve as Class Representatives.

The named Plaintiffs have sufficient understanding of the complex claims they assert under ERISA to serve as adequate class representatives. To qualify as an adequate class representative, it is not required that a plaintiff "be intimately familiar with every factual and legal issue in the case;" instead, the representative need only understand the "basic elements of her claim." *Moeller*, 220 F.R.D. at 611 (certifying a class even though plaintiffs did not fully understand the legal claims); *see also Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966) (reversing dismissal of derivative action even though plaintiff had little knowledge of the nature of the suit or the underlying facts); *In re Worlds of Wonder Sec. Litig.*, 1990 WL 61951 at *3 (N.D. Cal. Mar. 23, 1990) (finding class certification appropriate where the named plaintiffs were "familiar with the basic outline" of the case and understood "the gravamen of the claims"). This is especially true in a case involving a complex area of the law, where plaintiffs must especially rely on the legal expertise of counsel. *See, e.g.*, *Williams Corp. v. Kaiser Sand & Gravel Co., Inc.*, 146 F.R.D. 185, 188 (N.D. Cal. 1992) (finding that "[i]n complex litigation, a class representative need not have first hand knowledge of all of the details of his or her suit."); *In re Worlds of Wonder Sec. Litig.*, 1990 WL 61951 at *3 (stating "[t]he reality of complex cases . . . is that clients must defer a great amount of discretion to their lawyers."); *In re MDC Holdings Sec. Litig.*, 754 F. Supp. 785, 803 (S.D. Cal. 1990) (finding "plaintiffs in a complex . . . case . . . cannot be expected to be intimately familiar with ever factual and legal issue in the case."). This case is particularly complex; it involves thorny legal issues – in particular, the scope of a fiduciary's duties under

ERISA – and difficult facts relating to methodologies for appraising privately held companies, liability for asbestos-related lawsuits, and the functioning and proper valuation of "tracking stock," to name a few.

The threshold of knowledge required to qualify a class representative is low because requiring class representatives to possess a high level of knowledge of the legal claims "would convert the class action into a device usable only by individuals with such a degree of sophistication that they would be capable of acting as their own attorneys." *Moeller*, 220 F.R.D. at 611-12; *see also In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 120 (C.D. Cal. 2007) (stating the "threshold for sufficient knowledge is not high"); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 165 (C.D. Cal. 2002) (finding adequacy where plaintiffs had "at least a rudimentary understanding of the nature of the present action").

The cases cited by Defendants in which proposed class representatives in cases brought within the Ninth Circuit were disapproved are inconsistent with controlling Ninth Circuit precedent, as set forth above, and also involve circumstances not present here. *See Welling v. Alexy*, 155 F.R.D. 654, 659 (N.D.Cal.1994) (finding that plaintiff was inadequate because he showed a "complete lack of interest in the conduct of the case"); *Burkhalter*, 141 F.R.D. at 154, 154 n.5 (finding no adequacy of class representatives where plaintiff showed a "severe lack of knowledge about the basic facts at issue" in the case); *Lubin v. Sybedon Corp.*, 688 F. Supp. 1425, 1462 (S.D. Cal. 1988) (finding a class representative inadequate where the plaintiff was "alarmingly" unfamiliar with the claims).[2]

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[2] Each is also distinguishable on its facts. *Welling* was a securities fraud case where the disqualified plaintiff not only had "a complete lack of interest in the conduct of the case," 155 F.R.D. at 659, but was also subject to a strong inference of improper conduct by virtue of the fact that he had been a plaintiff in 13 other securities actions, all brought by the same attorney. 155 F.R.D. at 658-59. This also rendered him subject to a unique defense because it called into question whether he had actually relied on the market, as required in a securities action, rather than simply shopping for a lawsuit. *Id.* In *Burkhalter*, the president of the proposed class representative company stated at one point that he thought the class was composed of the defendants, and he was not prepared to act as a fiduciary for the class. 141 F.R.D. at 154. And in *Lubin*, the disqualified representative showed an "alarming unfamiliarity" with even the "outlines"

Here, Plaintiffs Fernandez, Smith, and Thomas all understand the basic allegation in this case: that the ESOP paid too much for the stock at the time of the initial transactions. Supplemental Declaration of Nina Wasow in Support of Plaintiffs' Motion for Class Certification ("Wasow Dec."), Exh. 1 (Fernandez Dep. 79:15-21, 81:21-84:11, 114:25-115:5, 118:12-17, 172:2-8); Exh. 2 (Smith Dep. 53:22-56:11, 77:13-78:1); Exh. 3 (Thomas Dep. 65:1-10, 149:14-150:7, 174:23-176:8, 177:6-178:12, 206:10-207:4). For example, Mr. Fernandez states that he "felt that the obligations of K-M Industries . . . in regards to the outstanding amount of the asbestos lawsuits weren't really properly taken into effect when the ESOP was created – or taken into account." *Id*. at Exh. 1 (Fernandez Dep. 172:2-8). Ms. Smith testified that in 2005 she became aware that more than fair market value may have been paid for the ESOP stock due to potential asbestos-related litigation liability. *Id*. at Exh. 2 (Smith Dep. 53:22-56:11). Ms. Thomas stated her understanding that "there was too much paid into the plan," at least in part due to potential asbestos liability. *Id*. at Exh. 3 (Thomas Dep. 65:1-10, 149:14-150:7). In addition, Plaintiffs each understand that if the case is certified as a class action, as class representatives they will represent and must look out for the interests of all participants in the ESOP. *Id*. at Exh. 1 (Fernandez Dep. 29:11-22); Exh. 2 (Smith Dep. 42:11-23, 203:19-25); Exh. 3 (Thomas Dep. 190:2-191:15).

Accordingly, Plaintiffs Fernandez, Smith, and Thomas all have a sufficient level of understanding of the case to meet the low threshold for adequacy of class representatives. *See Moeller*, 220 F.R.D at 611-12; *Surowitz,* 383 U.S. 363; *In re Worlds of Wonder Sec. Litig.*, 1990 WL 61951 at *3**;** *In re Live Concert Antitrust Litig.*, 247 F.R.D. at 120; *Thomas & Thomas Rodmakers, Inc.*, 209 F.R.D. at 165. Plaintiffs need not have knowledge of every fact of the case, nor need they have an in-depth understanding of the legal theories in the case. This holds true in

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of the claims, having, among other things, never read any version of the complaint. 688 F. Supp. at 1462. No such circumstances are present here; as set forth herein, there is no implication of improper conduct; all three Plaintiffs have been involved in the case as necessary; have shown that they understand who is in the class and that they must protect the interests of the whole class; they have all reviewed at least one version of the complaint; and they all understand the gravamen of the claims is that the ESOP overpaid for stock.

any lawsuit, and especially in a case like this one, because it involves complex ERISA claims. *Williams Corp.*, 146 F.R.D. at 188; *In re Worlds of Wonder Sec. Litig.*, 1990 WL 61951 at *3; *In re MDC Holdings Sec. Litig.*, 754 F. Supp. at 803.

B. Plaintiffs Are Sufficiently Engaged in the Lawsuit to Protect the Interest of Class Members.

Plaintiffs have been involved in the litigation by providing documents, discussing their claims with counsel, responding to discovery, and attending depositions. Their involvement is more than sufficient to meet the requirements of Rule 23(a)(4). To satisfy the adequacy requirement of Rule 23(a)(4), a class representative need not come up with or even understand the complex legal theories in a case. *Moeller*, 220 F.R.D. at 611-12. Instead, a class representative need only show some knowledge of the claims, and "a demonstrated willingness to assist counsel in the prosecution of the litigation." *Thomas & Thomas Rodmakers, Inc.*, 209 F.R.D. at 165. Courts require some participation from class representatives, but do not require day-to-day involvement in the case. *See In re THQ, Inc. Sec. Litig.*, 2002 WL 1832145 at *7 (C.D. Cal. March 22, 2002) (finding plaintiffs had sufficient participation by having several conversations with counsel regarding the suit, demonstrating familiarity with the underlying bases for the suit, and participating in a deposition); *Williams Corp.*, 146 F.R.D. at 187-88 (finding adequacy of plaintiff where he participated in a deposition, produced documents, understood the nature of the allegations, was able to understand the basic claims, and understood who was in the class); *In re United Energy Corp. Solar Modules Tax Shelter Invs. Sec. Litig.*, 122 F.R.D. 251, 258 (C.D. Cal. 1988) (finding plaintiffs were adequate representatives where they produced documents, participated in depositions, and understood that any recovery would be for the class as a whole).

Furthermore, courts have found that, where plaintiffs' counsel has advanced the costs and fees of the litigation, a class representative's knowledge of the costs of litigation and potential liability is irrelevant. *See In re THQ, Inc. Sec. Litig.*, 2002 WL 1832145 at *8; *Williams Corp. v. Kaiser Sand and Gravel Corp., Inc.*, 1992 WL 335439 at *3 (N.D. Cal. Oct. 8, 1992) (finding plaintiff to be adequate despite his inability to finance the litigation where plaintiff's counsel

advanced costs of litigation, and citing 1 H. Newberg, NEWBERG ON CLASS ACTIONS, § 3.37 at 242-43 (2d ed. 1985)).

Here, Plaintiffs Fernandez, Smith, and Thomas are all sufficiently involved in the lawsuit. Each Plaintiff turned over to counsel all of the ESOP-related documents in his or her possession. Wasow Dec. Exh. 1 (Fernandez Dep. 50:15-53:10); Exh. 2 (Smith Dep. 73:1-24); Exh. 4 (Plaintiffs' Initial Disclosures for Tosha Thomas). Plaintiffs all had input into the contents of the complaint, and/or reviewed the complaint. *Id*. at Exh. 1 (Fernandez Dep. 176:18-177:1); Exh. 2 (Smith Dep. 50:2-14); Exh. 3 (Thomas Dep. 61:6-23). In addition to having periodic conversations with counsel regarding the status of the lawsuit, each of the Plaintiffs participated in an all-day deposition. For all of these reasons, Plaintiffs Fernandez, Smith, and Thomas have all shown "a demonstrated willingness to assist counsel in the prosecution of the litigation" sufficient to make them adequate class representatives. *See Thomas & Thomas Rodmakers, Inc.*, 209 F.R.D. at 165; *see also In re THQ, Inc. Sec. Litig*., 2002 WL 1832145 at *7; *Williams Corp.*, 146 F.R.D. at 187-88; *In Re United Energy Corp. Solar Modules Tax Shelter Invs. Sec. Litig.*, 122 F.R.D. at 258. Finally, Plaintiffs' counsel is advancing the costs of litigation, and the fact that Smith and Thomas are not prepared to pay for costs if Plaintiffs lose the case is irrelevant to the determination of their adequacy as class representatives. *See In re THQ, Inc. Sec. Litig*., 2002 WL 1832145 at *8; *Williams Corp.*, 1992 WL 335439 at *3.

C. Plaintiffs' Motives for Bringing Suit Are Proper and Do Not Defeat Adequacy.

Defendants suggest that Plaintiffs Tosha Thomas and Lora Smith have motives for bringing this lawsuit different from that of other class representatives. However, Defendants' mischaracterization of their motives for bringing suit does not render them inadequate class representatives. Furthermore, Defendants make no suggestion that Plaintiff Thomas Fernandez has any such conflict.

The motives of plaintiffs are not determinative of whether they will provide vigorous advocacy for the members of the class. *See Fentron Indus., Inc. v. Nat'l Shopmen Pension Fund*, 674 F.2d 1300, 1305 (9th Cir. 1982) (overruled on other grounds)(finding class certification

proper despite employer soliciting lawsuit against pension fund); *Weinberger v. Jackson*, 102 F.R.D. 839, 845 (N.D. Cal. 1984) (holding that "[p]ersonal qualifications or motives of the proposed class representative are not determinative of the adequacy of the representative"); *Steiner v. Tektronix, Inc*., 1991 WL 57033, at *3(D. Or. Feb. 7, 1991) (finding that a plaintiff having "spite or personal animus" or being involved in other lawsuits against defendant does not bar him from serving as a class representative).

Some courts have suggested that if a plaintiff has significant grievances against a defendant separate from the claims of the lawsuit, the individual's "vindictiveness" might demonstrate a conflict with the class, making her an inadequate class representative. *See Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir. 1990). However, courts are very hesitant to find individuals inadequate on this basis. *See Kayes v. Pacific Lumber Co*., 51 F.3d 1449, 1464 (holding plaintiffs' previous lawsuits asserting other claims "reveal some animosity," but "hardly constitute evidence of vindictiveness to such an extent that these plaintiffs cannot adequately represent the class."); *Lim v. Citizens Sav. and Loan Ass'n*, 430 F. Supp. 802, 811-12 (N.D. Cal. 1976) (noting "plaintiff's professed 'revenge' motive," but finding plaintiff an adequate class representative, stating "the vengeance of an aggrieved person more often engenders the zealous prosecution essential to a class action than the over-zealous prosecution which may threaten to strangle a class action.").

Here, Defendants suggest that Plaintiff Smith is an inadequate class representative because she originally sought counsel when she was unable to cash out of the ESOP. While Ms. Smith originally was told she could exercise the put option of her ESOP stock in 2007, she was later told that the ESOP loan had been changed and that she could not cash out until much later. Wasow Dec. Exh. 2 (Smith Dep. 66:21-67:7). This is why Smith originally got in touch with Plaintiffs' counsel, and thereafter became involved in the lawsuit. *Id*. (Smith Dep. 22:13-24). This course of events was not improper in any way. Indeed, the fact that Ms. Smith was concerned about her ESOP account, sought help from an attorney, and now prosecutes claims on behalf of all ESOP participants tends to show that she is more than adequate. In any event, as described above, Ms. Smith's personal motives for becoming involved in the lawsuit are not

dispositive of whether she will act as an advocate for absent class members. *See Fentron Indus., Inc.*, 674 F.2d at 1305; *Weinberger*, 102 F.R.D. at 845. Ms. Smith has expressed that she understands the claims in the lawsuit and is willing to represent and look out for the interests of all participants in the ESOP. Wasow Dec. Exh. 2 (Smith Dep. 42:11-23, 203:19-25). There is no evidence that she has a vengeful motive. Therefore, Ms. Smith is an adequate class representative.

Defendants also suggest that Plaintiff Thomas would be an inadequate class representative because she "has a personal axe to grind against Kelly-Moore." Defendants' Opposition to Plaintiffs' Motion for Class Certification at 3. However, not only is this characterization untrue, but it is also not determinative of Ms. Thomas' ability to serve as an adequate class representative in this case. Ms. Thomas testified that she left employment at Kelly-Moore Paint Co. because she felt she was discriminated against and was subject to a hostile work environment. Wasow Dec. Exh. 3 (Thomas Dep. 30:19-24). Ms. Thomas filed an EEOC charge, which is pending. *Id*. (Thomas Dep. 53:14-54:24). However, Ms. Thomas also testified that she is not angry with the company, and that she understands that her duties to the class as a class representative are to look out for the best interests of the class. *Id*. (Thomas Dep. 190:2-191:15; 209:8-210:1). As with Ms. Smith, Ms. Thomas' personal motivation for becoming involved in the lawsuit does not preclude her from being an adequate class representative. *See Fentron Indus., Inc.*, 674 F.2d at 1305; *Weinberger*, 102 F.R.D. at 845. Also as with Ms. Smith, there is no implication that Ms. Thomas or her counsel has acted inappropriately in this lawsuit as a result of her unrelated discrimination concerns. Furthermore, even if Defendants were correct in their characterization of Plaintiff Thomas's animus toward Kelly-Moore, courts have found that a spiteful plaintiff who is involved in other lawsuits against the same defendant(s) is not barred from serving as a class representative, and in fact might even make a more zealous advocate in the case. *See Kayes*, 51 F.3d at 1464; *Lim*, 430 F. Supp. at 811-12; *Steiner*, 1991 WL 57033 at *3-4. Therefore, Ms. Thomas is an adequate class representative in this case despite her discrimination charge against Kelly-Moore.

At no point have Defendants asserted that Mr. Fernandez has "an axe to grind." As noted

above, Mr. Fernandez is prepared to look out for the interests of the entire proposed class. Fernandez Dep. 29:11-22.

III. CONCLUSION.

Plaintiffs Fernandez, Smith and Thomas are committed to representing the class vigorously and have no conflicts with the class. They are adequate representatives under Rule 23(a)(4). For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Class Certification and for appointment of Plaintiffs' counsel as class counsel.

Dated: June 19, 2008

Respectfully submitted,

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By: /s/

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